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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 UNITED STATES OF AMERICA,

5 v.

17 Cr. 548 (JMF)

6 JOSHUA ADAM SCHULTE,

7 Defendant.

Conference

8 -----x
9 New York, N.Y.
10 February 14, 2022
11 2:30 p.m.

12 Before:

13 HON. JESSE M. FURMAN,

14 District Judge

15 APPEARANCES

16 DAMIAN WILLIAMS

17 United States Attorney for the
18 Southern District of New York

19 BY: DAVID W. DENTON JR.

20 MICHAEL D. LOCKARD

21 Assistant United States Attorneys

22 JOSHUA A. SCHULTE, Defendant *Pro Se*

23 SABRINA P. SHROFF

24 DEBORAH A. COLSON

25 Standby Attorneys for Defendant

Also Present: Daniel Hartenstine, CISO

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1 (Case called)

2 MR. DENTON: Good afternoon, your Honor. David Denton
3 and Michael Lockard for the government.

4 MR. LOCKARD: Good afternoon, your Honor.

5 THE COURT: Good afternoon.

6 THE DEFENDANT: Josh Schulte, appearing *pro se*.

7 THE COURT: Good afternoon.

8 MS. SHROFF: Good afternoon, your Honor. Sabrina
9 Shroff and Deborah Colson. We are standby counsel for
10 Mr. Schulte.

11 THE COURT: Good afternoon to you as well.

12 All right. My standard reminder that we're in an
13 unclassified setting. I don't anticipate the need to discuss
14 any classified information today, but if there is a need, then
15 we'll need to reconvene elsewhere. So try to restrict
16 yourselves.17 Earlier today, Mr. Schulte filed a letter motion that
18 is totally illegible to me. It seemed to be written in pencil,
19 at least the scanned version that was docketed on ECF. I have
20 trouble making out more than a few of the words, so
21 Mr. Schulte, do you want to tell me what --

22 THE DEFENDANT: Yeah, so --

23 THE COURT: -- that says? I'm not sure what to do
24 with it. I can't rule on it because I can't read it.

25 THE DEFENDANT: Yeah, so the issue -- the underlying

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1 issue, I guess, is the laptop issue that we can discuss later.
2 But the issue is that MDC does not allow me to use a pen. I
3 have a -- I have a little -- they have little flexible pencils
4 that we can use.

5 THE COURT: Can you just speak directly into the
6 microphone, please.

7 Hold on, Mr. Schulte.

8 Can you just speak directly into the microphone,
9 please, and start over. So I understand the MDC doesn't allow
10 you to use a pen and they gave you some sort of --

11 THE DEFENDANT: Yeah. They give us a little flexible
12 pencil that doesn't -- you can't really read it.

13 THE COURT: I definitely can't really read it. So I
14 don't know if you have the original with you or if you want to
15 just tell me orally what the issue is, but certainly I can't
16 rule on this motion because I can't read it.

17 THE DEFENDANT: Yes. It's -- I mean we can go ahead
18 and start discussing the issue. It's the laptop issue.
19 Essentially without the ability to use the laptop to type
20 information, then that's the only mechanism I have left to use,
21 is the pencil, and the document is essentially saying just that
22 the, that without the laptop, without the laptop, I can only
23 use the pencil, and that's what it would look like, and it's
24 hard to write, it's hard to read, and so --

25 THE COURT: And this is the laptop in the MDC? You

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1 obviously have access to all sorts of things in the SCIF, but
2 we're talking about the MDC.

3 THE DEFENDANT: That's correct. So, and
4 Mr. Hartenstine can talk about this, but the SCIF is just used
5 for classified information, so any classified motions or
6 anything like that I'll write at the SCIF. The SCIF doesn't
7 have unclassified motions or access to law library, case law,
8 anything like that. So all the unclassified motions that
9 involve case law and stuff like that I've all been writing,
10 typing on my laptop and then transferring that information to
11 my attorneys, not just that information, but I also have
12 exhibits planned, cross-examination, video demonstratives. I
13 also write things for my expert to do, to communicate with. So
14 I use a laptop for all these things. So the issue now is -- I
15 guess the underlying question is whether or not I have a right
16 to utilize a laptop in this way, to prepare my defense, both
17 pretrial motions and for trial.

18 THE COURT: OK. I'm a little confused because I think
19 you have a laptop. I have received any number of letters from
20 you that were obviously prepared on a laptop, so why is it that
21 this letter you couldn't prepare on the laptop only?

22 THE DEFENDANT: Because now, without the DVD drive,
23 that's what I've been using to transfer the documents from the
24 laptop. And so there's essentially three different ways pretty
25 much that you can transfer things from the laptop -- the first

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1 would be the network, like the internet. The Court has already
2 denied that. And the other two -- one would be USB drive,
3 removal of media, and then the third one is the DVD drive.

4 The Court will recall last time I tried to streamline
5 that process by involving the government directly and asked if
6 I could write to the DVDs and transfer them to BOP and then
7 have someone from the government -- not from the prosecution
8 team, obviously -- to also review it. The Court denied that
9 request, and so I continued to use the DVD writer. I've
10 always -- to this point I've just used the DVD writer, but now
11 that I no longer have that option, I essentially don't have the
12 ability to use the laptop anymore. So --

13 THE COURT: OK. Well, you do have the ability to use
14 the laptop. The issue is getting things off the laptop.

15 THE DEFENDANT: Correct, correct.

16 THE COURT: Mr. Denton, any thoughts here? I mean I
17 denied the request for a burner drive because it seemed to be a
18 violation of BOP's policy, but obviously this is not a tenable
19 situation if I can't read what he filed, so I don't know if
20 there's disingenuity going on here or what the story is, but I
21 certainly think there's an issue.

22 MR. DENTON: Your Honor, first of all, I would just
23 note, as we noted in our letter, the government is not aware of
24 the defendant having used this to transfer things to counsel
25 previously, but we're not aware of how he's transferring things

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1 to counsel, so I honestly can't speak to the historical
2 practice. Obviously it is a violation of BOP policy for him to
3 have a DVD writer.

4 We spoke with the Bureau of Prisons Friday to find out
5 if there was an opportunity for them to essentially take the
6 laptop and print things off of it for him there. However, I
7 think as an alternative, the defendant also has access to a
8 unit computer and in some way has been able to print things and
9 make typed submissions during the various periods in this case,
10 including recently, when he did not have access to a DVD
11 writer. So again, we're happy to try and explore alternatives
12 here to try and make this feasible. We agree that this is not
13 a tenable solution, but we've got a little bit of an
14 information gap on our side about what else the defendant has
15 used and is available to him.

16 THE COURT: OK. My inclination is to have you contact
17 the MDC and figure out a solution to this problem. I'm not
18 interested in violating BOP policy, but at the same time, it
19 does seem to me if he can use a laptop to draft things, we need
20 to have some sort of viable means to enable him to transfer
21 that to counsel and/or file it. What that is I'm happy to
22 leave to the MDC in the first instance to try and figure out a
23 creative solution that complies with their policies, but I
24 think that we need something. I mean this doesn't work.

25 So does that make sense?

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1 MR. DENTON: Yes, your Honor.

2 Like I said, we're happy to explore that option with
3 them. Again, we would note that something has worked for the
4 defendant during time periods when he did not have a DVD
5 writer. We don't know what that is, whether that was typing
6 things on a unit computer and printing them out from there or
7 whether there was some other solution that he was using, but
8 something else has worked other than just this in the past.

9 THE COURT: OK. Mr. Schulte, do you want to --

10 THE DEFENDANT: Yeah, I can speak to that.

11 So I've always had a DVD writer in the past. The only
12 time I didn't was -- I refer the Court to Dkt. 621. The Court
13 will recall that it received several letters from me that were
14 handwritten. Obviously I had a pen at this time, but whenever
15 I was moved from MCC to MDC -- let me back up.

16 While I was at MCC, they had a computer there that I
17 could use the DVD burner there, so their discovery computer
18 allowed me to use a DVD burner because my laptop didn't have an
19 internal one. So while I was at the MCC, I could just use the
20 MCC's computer to burn things to the DVD. When I was
21 transferred to MDC, I no longer had that, and so I wrote a
22 bunch of letters. I still had a pen at that point because MCC
23 did allow me to have a pen. So that -- this is the only time
24 in which I did not have a DVD writer, and during that time I
25 had to handwrite things that the Court didn't receive for,

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1 like, two months or something.

2 THE COURT: All right.

3 MS. SHROFF: But aside from that, I always have just
4 used the DVD burner.

5 THE COURT: Mr. Denton, please contact the MDC
6 promptly. Report back within a week to figure out a solution
7 for this. I mean if the MCC had a computer that had a burner
8 drive available, one would think that there's a means by which
9 BOP could make that happen at MDC as well that is not a
10 violation of their policy. I also question why he can't have a
11 pen. Maybe there are good reasons for that, but I certainly
12 have received any number of communications from prisoners with
13 pens, so I'm not aware of a general policy prohibiting pens for
14 people in custody.

15 MR. DENTON: Yes, your Honor.

16 We will certainly look at that. I will just note that
17 the defendant's two letters filed in the first week of February
18 complaining about the lack of a DVD drive were typed, and so --

19 THE COURT: I understand. I don't know what's going
20 on here, and maybe there is a readily available explanation or
21 solution, in which case, MDC can perhaps provide information on
22 that, but certainly there needs to be a means for him to both
23 write his submissions and also file them in a manner that is
24 legible to everyone. So whether that solution is already
25 available to him and he's not availing himself of it or whether

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1 it needs to be made available, I want to know one way or
2 another.

3 MR. DENTON: Understood, your Honor.

4 THE COURT: OK. Dkt. 709 is denied without prejudice
5 to renewal because I can't read it, and hopefully, this will
6 sort it out and moot the issue. But in any event, I obviously
7 can't rule on a motion that I can't read.

8 Let me turn to the main item on our agenda today, the
9 protective order. I want to discuss various issues relating to
10 it, but before I get to that, let me cover two other issues or
11 areas.

12 One is open discovery issues, in particular, the three
13 items that Mr. Schulte discusses in his letter of January 24,
14 Dkt. No. 682. First is the missing discovery production, 6, 9,
15 and 12. Once again, I don't quite know. It seems like there
16 are ships passing in the night with his submissions and the
17 government's explanation, but just comparing his letter with
18 the government's letter of January 19, ECF No. 676, I guess my
19 best surmise is that he's referring to the hard drive that was
20 produced with discovery production 6 on November 8, 2017.

21 Mr. Schulte, is that accurate? Do you suggest that
22 it's the first of the two hard drives that were produced? And
23 looking at the government's letter, that would seem to be the
24 hard drive you're referring to. Do you have any idea if that's
25 accurate?

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1 THE DEFENDANT: So, yeah, the problem is, I think, the
2 government's referring to when they produced discovery No. 6,
3 and what I'm referring to is the first large hard drive that
4 they presented, that they gave to me contained all the
5 discovery up to that point, which included 6, 9, and 12. And
6 so I'm just saying that the very first large hard drive that
7 the government produced to me that can't be -- that requires
8 external power and so the MDC has to store that, that is
9 missing, and that's the only one I've ever received that has
10 those three productions, 6, 9, and 12. It contained a whole
11 lot of other discovery besides 6, 9, and 12, but that's the
12 only place where I ever had the full production of 6, 9, and
13 12.

14 As to what the government's saying about when, and
15 stuff like that, I don't know. That's the thing. I don't know
16 when or anything else. All I know is it's the very first large
17 hard drive that requires external power.

18 THE COURT: Again, I don't know how to make heads nor
19 tails of this because the government seems to suggest that
20 there was no single production with 6, 9, and 12 on it.

21 Mr. Denton, is that correct? Am I reading your letter
22 correctly?

23 MR. DENTON: Yes, your Honor. That's correct.

24 To the extent that what the defendant is looking for,
25 though, however, is the physical, single external hard drive

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1 set that requires external power, as we advised him by letter
2 and in our January 19 letter to the Court, we've confirmed that
3 the MDC has that. It just needs a new power cord, so if the
4 defendant or standby counsel gets us a new power cord for it,
5 we can make it available to him again.

6 THE COURT: All right.

7 Standby counsel, is it possible to get a new power
8 cord to solve this problem?

9 Please speak into the microphone.

10 MS. SHROFF: Certainly, your Honor.

11 THE COURT: Great. So why don't you do that as
12 quickly as possible so hopefully we can work through that
13 issue.

14 The second item is the Verizon records. The
15 government has previously represented that there are no such
16 records, and any records have been produced. Mr. Schulte, in
17 his January 24 letter, suggests that there might be others
18 relating to his, quote/unquote, Virginia records, and the like.

19 Mr. Denton, can you shed any light on that?

20 MR. DENTON: So, your Honor, again, having completed
21 the discovery review that we described in our status letters to
22 the Court, we are not aware of any additional Fios records
23 provided in response to subpoena. There were Fios records
24 produced in response to 2703(d) orders, which have been
25 provided to the defendant. We also explained in a letter to

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1 the defendant, dated February 1, that what he characterizes as
2 Fios records in the government's most recent or supplementary
3 production were not, in fact, Fios records but were, in fact,
4 Verizon telephone subscriber records for other phone numbers.

5 So again, we don't think that there's anything else to
6 provide to him in that regard.

7 THE COURT: All right. I accept the government's
8 representation on that, and that should put that issue to rest.

9 Mr. Schulte, if that means you need to take other
10 steps -- you referenced subpoenaing Verizon -- then you should
11 do whatever you're permitted to do under the rules, but it
12 doesn't sound like there's anything further to discuss.

13 The last issue is the SC1 drive. Candidly, I'm not
14 sure I understand what the issue is here, but Mr. Schulte
15 suggests that it's missing several forensic images and requests
16 that I order the government to either identify all alleged
17 illicit files on the two different logical drives or if there
18 are none to explain why it wasn't produced in unclassified
19 discovery.

20 Mr. Denton, any response, thoughts, comments on that?

21 MR. DENTON: So, your Honor, I think there's two
22 different components to that request. The first deals with
23 portions that the defendant believes that were not produced
24 previously, SC49, SC50, and SC51. That was an issue that we
25 had hoped to discuss with the defendant, because our

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1 understanding is that those were, in fact, produced as part of
2 the images of SC48, the underlying item, and then also as part
3 of the SC1, not SC01 -- I realize it's getting confusing --
4 production. However, we did also tell the defendant that,
5 again, if he wants additional copies of any of this, if he
6 provides us with a hard drive, we will make copies of these
7 things for him again, happily.

8 With respect to the second request, requesting the
9 government to identify particular illicit files on the hard
10 drive that contains the child pornography stored in the SCIF,
11 in the SCIF's safe, essentially, as a way of complying with the
12 Adam Walsh Act, we also informed the defendant that our
13 position is that that is relief that was already denied by
14 Judge Crotty, and so we are not planning to provide the data in
15 any different form at this time.

16 THE COURT: All right. I think I may have ruled on it
17 myself, but in any event, Mr. Schulte.

18 THE DEFENDANT: Just to clarify that point, because
19 that wasn't what I was requesting. The point is that there's
20 this -- there's four different hard drives that were produced
21 and three of those hard drives are form 1 logical drives, and
22 that's the RAID5 drive that the government -- that's where the
23 government alleges the child pornography resides.

24 There's a second entire hard drive, 500 gigabytes, and
25 the government does not allege that it contains any CP or

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1 classified information. So the request is simply to identify
2 whether or not that -- because if that hard drive doesn't
3 contain either of those, then they should be just produced in
4 unclassified discovery. I'm not saying to identify specific
5 files or anything like that. I'm asking whether or not this
6 contains classified information or CP, and if it doesn't, why
7 is it not produced in unclassified discovery. It's a
8 completely separate drive.

9 THE COURT: All right. Again, this is ringing a bell
10 as something we discussed.

11 Mr. Denton.

12 MR. DENTON: Your Honor, again, that's our position,
13 that this is an issue we've covered the ground on -- that we
14 separated out from one hard drive that was previously provided
15 the classified hard drive containing classified information and
16 the unclassified but still secured drive that has to be handled
17 in accordance with the Adam Walsh Act and that the material
18 that is on that hard drive should be maintained as such and
19 that no further no further subdivision is appropriate.

20 THE COURT: Is Mr. Schulte just incorrect that there
21 is a hard drive that doesn't contain either category of
22 information, either Adam Walsh-type materials or classified
23 materials?

24 MR. DENTON: So, to the extent that I'm following
25 correctly, your Honor, there is one single physical hard drive

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1 that contains Adam Walsh materials and one single physical hard
2 drive that contains classified materials from his home
3 computer. If I understand correctly, he is saying that the
4 physical hard drive that contains the Adam Walsh Act-protected=

5 materials contains multiple different logical images and that
6 some subdivision to remove some amount of that so that he can
7 have it outside of the currently available form is what he's
8 asking for, and we think that falls within the relief that the
9 Court has previously denied.

10 THE COURT: I certainly agree with that, but I want to
11 make sure I understand whether it is that or not.

12 Mr. Schulte.

13 THE DEFENDANT: No, it is not. That's what makes this
14 a different request, is that there's actually a third hard
15 drive. It's not a different logical partition, which is -- the
16 previous request was to take the unrelated stuff off of the
17 same hard drive, but this is a different request because
18 there's actually a third hard drive, a third physical hard
19 drive and not just two. And that third physical hard drive is
20 not related to anything, and I specifically identified what
21 that drive is called, and I contained -- I think I put an
22 exhibit with it. It's a 500-gigabyte hard drive. The other
23 hard drive is very large, like four to five terabytes, or
24 something like this. They're not different logical, they're
25 completely different physical drives.

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1 THE COURT: Mr. Denton.

2 MR. DENTON: I'm at a bit of a loss, your Honor. I
3 know that there previously was one physical hard drive, which
4 was then removed and kept by Mr. Hartenstine for a period of
5 time. We replaced it with two physical hard drives. I'm not
6 entirely sure what the third one that he's referring to is.

7 THE COURT: What's your suggestion for how we handle
8 this?

9 MR. DENTON: I guess, your Honor, I think we can talk
10 to Mr. Hartenstine and try and confirm with the FBI exactly
11 what the defendant has under these circumstances, but as far as
12 I know, there is no third hard drive.

13 THE COURT: All right. Why don't you do some due
14 diligence on that with Mr. Hartenstine and with the FBI, or
15 whomever. And can you report back to me in a week on that
16 issue too?

17 MR. DENTON: Yes, your Honor.

18 THE COURT: All right.

19 As for the SC49, '50 and '51, I'll ask standby counsel
20 to provide a hard drive to the government to make a
21 reproduction of those in the event that Mr. Schulte doesn't
22 have them or can't find them, but then that should put that to
23 rest.

24 All right. I think that exhausts the open discovery
25 issues. Let me just comment -- I'm turning to the telephone

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1 conference question -- by saying that these are the types of
2 issues that, in my view, can and should be worked out through
3 conversation and good faith meet-and-confers between the
4 parties, including standby counsel, but principally Mr. Schulte
5 and the government. I certainly understand Mr. Schulte objects
6 to that. I understand that he has sought a stay of my order
7 requiring him to participate in those regular phone
8 conversations.

9 But Mr. Schulte, you should understand that as of this
10 time, my understanding is that there is no stay in place; that
11 is to say, I denied a stay of that order. You sought a stay
12 from the Court of Appeals, and to my knowledge, they have not
13 yet stayed it, all of which is to say that those orders remain
14 in effect at this time. If you continue to refuse to
15 participate, I will consider what action, if any, to take and
16 would invite the government to alert me and make whatever
17 application it thinks appropriate to rectify the situation.
18 But my strongly held view is that if Mr. Schulte wants to
19 represent himself, then he has to participate.

20 Mr. Schulte, are you paying attention?

21 THE DEFENDANT: Yes. I'm conferring with counsel
22 about the issue.

23 THE COURT: OK. My view is that if you want to
24 represent yourself, then you have to participate in good faith
25 communications with the government; that that is essential to

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1 ensuring that you have what you need and can access it and so
2 forth, the sorts of issues that we just discussed. If you fail
3 to do so, I think it becomes much harder to complain that you
4 don't have access to things like hard drives or the SC1 drive
5 or so on and so forth. Those are issues that can much more
6 easily be sorted out through a simple conversation, and those
7 sorts of conversations do not bear in any way, shape, or form
8 on your Fifth Amendment interests or rights.

9 The bottom line is, I think, if you don't participate,
10 it may well be that you just forgo some of these things and
11 they don't get remedied because that's not what these regular
12 conferences are intended for. That is for you guys to try and
13 work out, and at the extreme, it may be that you forfeit your
14 right to represent yourself because it just is impossible to
15 proceed in this manner. So that's obviously something that I
16 would only approach with some care and if things got
17 significantly worse, but the bottom line is I expect you to
18 participate and comply with my orders. And if you don't, I
19 would again invite the government to let me know and to make
20 whatever applications it thinks appropriate.

21 All right. With that, the third item on my agenda is
22 Mr. Schulte's request to file a pretrial motion regarding
23 quote/unquote seized email. That's Dkt. No. 695. The
24 government filed a response at Dkt. No. 708.

25 It filed it the other day, so Mr. Schulte, I don't

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1 know if you've seen a copy of the response. Have you received
2 it?

3 THE DEFENDANT: They provided a copy to me. I've read
4 it, and I can respond if you wish.

5 THE COURT: Sure. The first thing I'd like you to
6 tell me is they attach a document that they believe is the
7 document you're referring to. Is that correct?

8 THE DEFENDANT: Yes, I believe so.

9 THE COURT: OK. Do you wish to respond?

10 THE DEFENDANT: Yes, I do.

11 MS. SHROFF: Your Honor, may I just have one second
12 with Mr. Schulte?

13 THE COURT: Sure.

14 MS. SHROFF: Thank you, your Honor.

15 THE DEFENDANT: Standby counsel thinks it's wise to
16 request the -- whether the discussion that I have today about
17 this in court potentially can be used against me in
18 cross-examination at trial before I proceed.

19 THE COURT: I would think so.

20 Mr. Denton.

21 MR. DENTON: I would think so as well, your Honor.

22 THE COURT: That is one of the problems of
23 representing yourself. I think when you speak, what you say is
24 potentially useable against you in that sort of way. So I'm
25 not sure where that leaves you. You should certainly proceed

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1 with caution.

2 THE DEFENDANT: OK.

3 (Counsel and defendant conferred)

4 THE DEFENDANT: Some part of this Ms. Shroff may be
5 able to discuss in further detail, but I'll just begin.

6 So, the document that the government refers to was
7 initially an email that I sent to my first counsel, like,
8 March, right after the initial search warrant. It was emailed
9 to my counsel and specifically stated it was in response to
10 their request from me, so it was only used for my defense.

11 Later on, my attorney emailed that to my cousin, who
12 was effectively working as my paralegal whenever he left the
13 case. And at that point the government subpoenaed and
14 retrieved that email from them. And then proceeding up to
15 trial, Sabrina Shroff spoke with the government's lawyers and
16 showed them the initial email and the clear chain showing that
17 this was privileged, and the government eventually agreed with
18 her that it was, and then it -- that's why it wasn't used at
19 trial. So there was no litigation about this ever because the
20 prosecutors agreed that it was privileged. So like I said, we
21 have a copy of the initial email that was only sent to my
22 email -- that was only sent to my attorney. It was my attorney
23 that eventually emailed it to my cousin, who was functioning as
24 my paralegal at the time with all -- a bunch of other
25 information that he clearly says in the email attorney-client

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1 privilege; it's all the documents I have about this case while
2 I was in between attorneys because I could no longer afford him
3 so that was -- that's the issue, so --

4 THE COURT: And is there a reason that you didn't
5 raise this issue when I asked about any additional motions or
6 new motions that you wished to file?

7 THE DEFENDANT: Yes, because the -- the only reason
8 I'm raising it now is because the government raised it in their
9 CIPA filings. So you said anything new. So before it was
10 never raised because the former prosecutors from the last trial
11 agree that it was privileged and it wasn't used at trial so we
12 thought it was no longer being used. Now that the government
13 raised it in their CIPA letter, claiming that they intend to
14 use it now at trial, so this is in relation to that. So now
15 that they're trying -- now that the government is now saying
16 that they want to use it again, now I'm raising it.

17 THE COURT: And when did you get that?

18 (Counsel and defendant conferred)

19 THE DEFENDANT: Whenever they filed the CIPA 10. CISO
20 knows.

21 When was it filed?

22 THE COURT: January 28.

23 MS. SHROFF: January 28.

24 MR. HARTENSTINE: I believe that's correct, your
25 Honor.

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1 THE COURT: OK.

2 Mr. Denton, I guess one question is your letter
3 suggested that this exhibit was not used but not because the
4 government agreed it was privileged but just decided not to use
5 it for some reason. What Mr. Schulte is representing, and I'm
6 presuming comes in part from Ms. Shroff, sounds a little
7 different. Can you educate me?

8 MR. DENTON: So, your Honor, the government never
9 agreed that the message was privileged. I know Ms. Shroff had
10 a conversation with one of the prosecutors that previously
11 represented the government in this matter about it prior to the
12 trial. Again, I don't think there was any agreement that it
13 was privileged. Certainly there were other reasons why the
14 government decided not to use it at trial in the first matter.

15 THE COURT: And is it accurate to say that this was
16 included in the notice that you served on or about January 28?

17 MR. DENTON: Yes, it was, your Honor.

18 THE COURT: All right.

19 Ms. Shroff, do you want to shed any light on this,
20 tell me about whatever communications you had with the
21 government at the last trial?

22 MS. SHROFF: Your Honor, can I just consult with
23 Ms. Colson?

24 THE COURT: Yes.

25 MS. SHROFF: Your Honor, essentially, I believe that

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1 there might be just one small contradiction. I think
2 Mr. Schulte's recitation of the facts is, as I recall it, I
3 would not be able to say to the Court that the government
4 confirmed that it was my argument that led them not to use this
5 evidence that is being discussed here. I think the more
6 correct thing would be to say I made the argument to the United
7 States Attorney who was prosecuting the case then, and then the
8 next thing I was told is that they weren't going to use the
9 exhibit. So perhaps it's a logical conclusion for Mr. Schulte
10 to surmise that because my argument was based on privilege and
11 the chronology of that particular email, that the government
12 had accepted my argument and therefore he now concludes that
13 the government had conceded the privilege. It would be a
14 logical inference for him to draw, but I do not believe that I
15 ever communicated that because it's seldom that a prosecutor
16 says this is why I decided to do X.

17 THE COURT: And can you speak to whether and what
18 opportunity you had to raise this with Judge Crotty before the
19 last trial? Or did it never get litigated because the
20 government told you that it didn't intend to use it?

21 MS. SHROFF: That's my recollection, your Honor. The
22 government told us they weren't going to use it, and I think we
23 had so much on our plate that there wasn't any reason to raise
24 it with Judge Crotty. That's my recollection.

25 We have one overlapping AUSA, and I'm sure Mr. Denton

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1 can correct me, but we did not litigate it before Judge Crotty.

2 THE COURT: All right.

3 Mr. Denton, anything else on this front?

4 MR. DENTON: No, your Honor. I would just note as far
5 as the time line goes, in front of Judge Crotty, we litigated
6 this document extensively. There was a lot of discussion about
7 how it would be redacted for use at trial, what the exhibit
8 form of it would be. It was ruled on in the Court's Section 6
9 ruling. It was then brought up again in the government's
10 response to the defendant's motions with respect to the MCC
11 notebooks, and it was only after all of that that I recall Ms.
12 Shroff having a conversation with one of the prior prosecutors
13 on the case. So I think there was ample opportunity for it to
14 have been brought up before, but again, as far as the sort of
15 sequence of events goes, I think that's about the sum of it.

16 MS. SHROFF: Your Honor, may I just add something?

17 THE COURT: Yes.

18 MS. SHROFF: Of course, there was litigation under
19 CIPA 6. There's no doubt that there was. At that time, the
20 privilege issue wasn't raised because it wasn't a CIPA 6 issue.
21 When we raised the privilege issue and then they withdrew
22 introducing it as an exhibit, there wasn't any need to litigate
23 the privilege aspect of it because they agreed to the rest of
24 the relief we sought.

25 It would seem kind of odd for me to go to Judge Crotty

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1 and say Mr. X has decided not to use this exhibit, but I'd like
2 to raise it anyway. So if they weren't going to use it, I
3 didn't raise it.

4 THE COURT: All right. So, I'm not sure I need to get
5 to the bottom of this to resolve the question I'm presented at
6 the moment, which is just whether Mr. Schulte should be given
7 an opportunity to raise it. I am persuaded that there's enough
8 ambiguity about what happened in the last proceeding, combined
9 with the fact that he -- well, at least gave him some reason to
10 believe that this was off the table until the notice that he
11 received on January 28, that he should be given an opportunity
12 to be heard. So I will let him file a motion on this. I will
13 give him until March 7 to file a motion. I'm going to limit it
14 to 15 pages, because this doesn't seem like an especially
15 complicated area of law or issue. The government is to respond
16 by March 18, and then any reply by March 25. The government's
17 reply is also 15 pages. Any reply is limited to seven pages.

18 All right. That brings me to the main item on the
19 agenda, which is the protective order. Mr. Schulte has had, I
20 think, three months' notice, an opportunity to weigh in, and
21 I'm not entirely sure why he hasn't yet availed himself of
22 that, but I did say that he'd have an opportunity to be heard
23 today.

24 So I don't know if you want to be heard at the outset
25 or just on each of the issues that I was planning to discuss or

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1 what you would like.

2 Mr. Schulte.

3 THE DEFENDANT: Yes. So the issue comes back to the
4 DVD drive. I had prepared a response, but I could not have it
5 printed. And then I also want to raise to the Court's
6 attention that the last week the MDC seized the laptop so I've
7 been unable -- they recently returned it, but due to the DVD
8 drive issue, they were investigating -- whatever they were
9 doing. So they seized the laptop for a week, so I was unable
10 to copy my 15-page thing by hand as well. That's the reason I
11 didn't raise it, but there's two main issues that I want to
12 discuss with the Court regarding the protective order.

13 THE COURT: Go ahead.

14 THE DEFENDANT: OK. One of them was the language
15 regarding certain classified documents that could only be
16 produced to standby counsel and could not be produced to me.
17 Talking with the CISO, it appears that there are no documents
18 like this currently. I don't think the language should include
19 that going forward, since I am representing myself; there's no
20 reason that I shouldn't have access to all the materials.

21 THE COURT: OK.

22 THE DEFENDANT: And then the second issue is if the
23 Court decides to include the restraints in the protective
24 order, this is where -- in my letter, I reference -- this was
25 initially brought before Judge Crotty in the last conference

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1 before he left, and Judge Crotty ordered the government to
2 discuss with the marshals about the chains to decide and
3 whether or not the marshals would, based on the fact that for
4 three years there's been no issues, if they would just, if they
5 could forgo the chains and what the issue with the chains were.
6 And so I want to bring that up, that there's essentially no
7 reason.

8 I mean I just have these same leg restraints that I
9 have here. There's even more people at the SCIF watching than
10 there are here, and they're right outside the hall. So there's
11 no -- and like I argued, I've never been ruled a flight risk.
12 There's just no reason. There's no legitimate government
13 objective for having me chained to the floor and I can't just
14 move about the SCIF normally.

15 So I just wanted to raise that to your attention, that
16 it was brought before Crotty before and Crotty did ask the
17 government to confer with the marshals, but I don't believe
18 anything ever happened from that.

19 THE COURT: I read the pretrial conference transcript
20 discussion of that, and I think essentially Judge Crotty said
21 he was going to speak with the marshals.

22 THE DEFENDANT: Oh, OK. My mistake.

23 THE COURT: That's OK.

24 So I don't know what, if anything, came of that, but
25 obviously, it hasn't changed. And what I was going to say is

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1 that I plan to do the same. We'll get to that provision in due
2 course. I don't know if it's necessary to even address that in
3 the protective order, which I think more pertains to the
4 handling of classified information, and I suspect that perhaps
5 that should just be left to the marshals. And I can weigh in
6 as needed, but I will tell you that, for the most part, I will
7 defer to the marshals when it comes to decisions regarding
8 security and their security protocols. But again, why don't we
9 cover that one when we get to it. Both of those were on my
10 agenda of issues to discuss.

11 Before I get into the particulars, I'm going to go
12 through the redline, and I'm not planning to discuss each and
13 everything flagged in the government's letter, which is Dkt.
14 670, and standby counsel's response, which is 689. Some of
15 those issues, I think, I can just resolve on my own, but I
16 wanted to discuss some of them. But before I get there, let me
17 raise as a question, I think some of the issues in these
18 letters pertain to the role of standby counsel and also, dare I
19 say, I think arise from -- my sense is that relationships, in
20 all different directions, but they've gotten a little bit more
21 complicated in this case -- between standby counsel and the
22 government, standby counsel and Mr. Schulte, as reflected in
23 the recent motions on that front. And one of the things that
24 standby counsel referenced in their letter is a specific
25 reference to the possibility or the question of whether I would

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1 require that they accompany Mr. Schulte at all times in the
2 SCIF. But I wanted to raise it as a broader question of
3 whether to appoint, as a third standby counsel, Mr. Kadidal. I
4 don't know Mr. Kadidal. I've spoken to Mr. Hartenstine about
5 him, and again, if he knows him well and has worked with him
6 and worked well with him -- I'm thinking out loud here, but the
7 thought occurred to me that perhaps adding him to the mix as
8 sort of fresh blood, as the case may be, might -- could
9 potentially be productive in all different directions and
10 facilitate communications, some of which have gotten a little
11 more complicated here than I would have thought they should or
12 would like, but we are where we are.

13 So I'm not suggesting I'm doing that. I'm just
14 looking for thoughts.

15 Mr. Denton.

16 MR. DENTON: So, your Honor, I think we have no
17 position on that. I think whatever the Court views as most
18 efficient here and consistent with the interplay of the various
19 Federal Defenders and CJA appointments is fine with us. I
20 assume given that Mr. Hartenstine has spoken up on this that
21 access to the SCIF and all that is not going to be an issue.
22 So we don't see a security issue there, as far as I know.

23 THE COURT: All right.

24 Ms. Shroff, do you wish to say anything on this?

25 MS. SHROFF: I don't think so, your Honor, unless the

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1 Court has questions. I can speak to Mr. Kadidal's role and how
2 I know him.

3 THE COURT: Sure. Why don't you do that.

4 MS. SHROFF: So, Mr. Kadidal and I are both part of
5 the South Asian Bar, and I've worked with him on other matters.
6 He's a lawyer at CCR, and we're colleagues. I might say we're
7 friends. He has assisted me before in issues relating to cases
8 that involve national security. He has clearance, and he would
9 be available as a third person with a limited role because --
10 and I just say this in case the Court wants to know his skill
11 set. He's not a criminal defense lawyer but is able to assist
12 in matters regarding this case, and of course, he's somebody
13 known to Mr. Schulte.

14 I think actually the Court might know him from law
15 school. I'm not sure. You seem to have overlapped somewhere
16 or went to the same law school; I don't know. But he would be
17 an addition to the team that would help us specifically with
18 CIPA 10 matters to the extent we need to consult with him and
19 also help us with the SCIF.

20 I would note for your Honor that our objections to us
21 being made hall monitors in the SCIF is not impacted by Mr.
22 Kadidal.

23 THE COURT: I understand that. I think you raised him
24 in connection with that, but I was broadening it and wondering
25 whether it might be useful, if it's permissible, to include him

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1 for other reasons.

2 Mr. Schulte, do you have a view? I don't know if you
3 know Mr. --

4 THE DEFENDANT: No, I do not.

5 THE COURT: Have you met Mr. Kadidal?

6 (Defendant conferred with counsel)

7 THE DEFENDANT: Yes. Yes, I have.

8 THE COURT: All right. And do you want to speak to
9 your ability to work with him, since that may have some bearing
10 on this?

11 THE DEFENDANT: Yeah -- no. Like she said, he worked
12 on some of the CIPA stuff, and I think we have a good
13 relationship. He's a unique guy to talk to, has a lot of
14 knowledge, so --

15 THE COURT: All right. And to the extent that he
16 previously worked on this matter, Ms. Shroff, was that *pro
bono*, or was that through CJA? How does that work? Since he's
17 not part of the panel, I would need to look into what the rules
18 and regulations are there.

20 MS. SHROFF: Well, your Honor, I was with the Federal
21 Defenders at that time when I retained him.

22 THE COURT: OK.

23 MS. SHROFF: I just wanted to note, your Honor, one
24 other thing. I'm assuming that Mr. Schulte is still going *pro
se*. To the extent Mr. Schulte decides at some point not to go

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1 *pro se* and he asks standby counsel to assume representation,
2 Mr. Kadidal would not be able to assist us at trial. I just
3 wanted to be as candid with the Court as possible.

4 THE COURT: I appreciate that. Candor's always
5 welcome.

6 Let me say a few things. First of all, I don't know
7 if Mr. Schulte would have the right to just go in that
8 direction if he wanted to. If he does, we'll take that up if
9 and when it arises. What I'm contemplating here is, I think,
10 separate and apart from that. It doesn't sound like it would
11 be appropriate to have Mr. Kadidal at counsel table during
12 trial. Not being a criminal defense lawyer, I just don't think
13 he would bring anything to bear in that setting, but what I'm
14 pondering and I think I'll discuss with the powers that be with
15 respect to CJA is perhaps it makes sense to bring him on board
16 for the pretrial portion of this case to facilitate and assist
17 with classified filings and the classifications and CIPA
18 process but wouldn't contemplate that he would be at counsel
19 table for trial. I think that would be overkill and
20 unnecessary on top of him not having a skill set that makes
21 sense in that setting.

22 Does that make sense?

23 MS. SHROFF: Yes, your Honor.

24 THE COURT: All right.

25 Mr. Denton, I assume you have nothing further to add

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1 on that.

2 MR. DENTON: Fundamentally, your Honor, I think our
3 view on this is that the purpose is to facilitate the
4 defendant's access to the SCIF. So whatever does that I think
5 we're fine with.

6 THE COURT: All right. Well, I think it's that and
7 facilitates the litigation process with respect to classified
8 information more broadly, and I guess what I'm suggesting is
9 that perhaps bringing in Mr. Kadidal would assist in that
10 regard and make it easier for me, among others. So I will
11 ponder that and look into it.

12 All right. Getting into the more particulars of the
13 proposed order, this is going off of the redline version
14 submitted by the government, which is Dkt. 670-1.

15 First of all, starting on paragraph 2, 2(b)(iv) and
16 (v), I think standby counsel have raised an objection to this,
17 at least reflected on the government's letter, objected to
18 these paragraphs. I think the objection is misplaced in the
19 sense that -- and this gets to the larger issue of standby
20 counsels' role in terms of screening things for classified
21 information. But I think elsewhere in the order, paragraphs 5
22 and 20, for example, it discusses the defendant and standby
23 counsel have obligations not to file things publicly if they
24 know or reasonably should know contain classified information.
25 So I think that is elsewhere in the order, and appropriately

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1 elsewhere in the order, and I'm not prepared to take it out all
2 together. That being said, it seems to me that paragraphs but
3 2(b)(iv) and (v) are not -- are misplaced in the sense that
4 paragraph 2(b) is a definition of what is classified
5 information, and it seems odd to define classified information
6 as information that counsel knows or reasonably should know
7 contains classified information. That seems tautological and
8 not really responsive to what the paragraph is meant to do.

9 So I'm inclined to just strike those two paragraphs
10 since I think those documents and information are encompassed
11 within the definition of classified information more broadly as
12 set forth in 2(b). And as I said, there are other provisions
13 in the order that govern the filing and handling of classified
14 information and turn on what counsel knows or reasonably should
15 know. So it just doesn't seem like these paragraphs belong
16 here.

17 Mr. Denton.

18 MR. DENTON: Your Honor, I'm sympathetic to the view
19 on the tautological definition there. I think the only things
20 I just want to make sure of are paragraph 4 makes clear that
21 the classified status is regardless of the origin of the
22 information, and paragraph 5 also specifies sort of different
23 ways in which the defense can be made aware of the classified
24 nature of information, both of which seem like relevant things
25 to include. So I'm just trying to see if there's a different

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1 point in the order where those would make sense to go.

2 THE COURT: All right. I'll tell you what. Maybe
3 rather than drafting on the fly, it might make sense for me to
4 flag some of these things, and then anyone who wishes to submit
5 something after the conference with suggestions, with further
6 thoughts can do that. Let's flag that.

7 I'm just looking. Paragraphs 8 and 9 do seem to cover
8 some of what you were describing; namely, making clear that,
9 for instance, classified information that also appears in the
10 public domain is not thereby automatically declassified, etc,
11 So it may be that those points are covered elsewhere. It just
12 doesn't seem to make sense to me to define classified
13 information as information that counsel should know is
14 classified. That doesn't bear on the definition of classified
15 information. So my proposal would be to strike 2(b)(iv) and
16 (v), and if you think there's something in there that needs to
17 be somewhere else in the order, I'm certainly open to your
18 suggestions on that front.

19 Turning to paragraph 9, in the government's letter,
20 there's an indication that standby counsel wants to replace
21 "government counsel" with "the CISO" at the end of paragraph 9.
22 I guess my inclination was why not make it "unless government
23 counsel or the CISO confirms that it is not classified."

24 Wouldn't that suffice and cover our bases?

25 Mr. Denton.

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1 MR. DENTON: Sorry, your Honor. I'm just reading the
2 carryover language here.

3 I think, your Honor, and I'll let Mr. Hartenstine
4 speak to this, I don't think we have an objection to that
5 except for the fact that, as far as I know, Mr. Hartenstine is
6 not able to make classification determinations independent of
7 consultation either with us or with the classifying authority.
8 And so again, to the extent that we view incorporating Mr.
9 Hartenstine's role here as also incorporating the downstream
10 consultation people who are able to make those representations,
11 I don't think we have an issue with him being the person who
12 says it to defense counsel.

13 THE COURT: OK. I mean to be clear, aren't you in the
14 same boat? You don't have declassification or classification
15 authority either, right; you're just a conduit?

16 MR. DENTON: That is also true.

17 THE COURT: OK. My impression from Mr. Hartenstine
18 when we talked earlier is that he is happy to play an
19 intermediary role, and indeed, that's something I'll get to in
20 due course.

21 Mr. Hartenstine, is that correct?

22 MR. HARTENSTINE: Yes, your Honor. I think the
23 government -- right. Long story short, I'd be happy to play an
24 intermediary role and take any questions that need to be
25 addressed to the government as well as the classifying

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1 authority, the classification authority.

2 THE COURT: All right. So I'll add the words "the
3 CISO" in that line.

4 And then standby counsel, in their letter, raise a
5 broader objection with respect to paragraph 9 that I confess I
6 didn't really understand. So Ms. Colson or Ms. Shroff, did you
7 want to speak to what your issue was there?

8 MS. SHROFF: May I, your Honor?

9 So, paragraph 9 was to seek from the equity holder
10 some more guidance, so to speak, on what now is still
11 classified in this case. There have been years of litigation
12 about certain information, and some of the classified
13 information has since been declassified. Some of the
14 classified information still remains classified. At times
15 we're under the impression that something has been declassified
16 and the government takes a different stand. So we discussed it
17 with the CISO, and we sought basically for them to give us some
18 kind of -- I don't know. I guess the American version is
19 called a quicksheet, or something like that, some kind of broad
20 guidance document, especially on matters that we have
21 repeatedly raised with the equity holder. And I put in the
22 footnote an illustration of why we continue to struggle with
23 what now remains classified.

24 I'm not getting into the why it remains classified,
25 because I understand the Court would say that's not my concern,

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1 and if the equity holder says it's classified, our due course
2 is to litigate it. But I've given an example of why one would
3 get easily lost in what remains classified.

4 THE COURT: I guess I don't know what you're asking
5 for. It does seem to me that this points to a broader issue,
6 which is just a little bit more open communication and
7 consultation would probably go a long way to avoiding some
8 misunderstandings and mistakes. And to that, one of the
9 suggestions I'm going to make in due course when we get there
10 is that essentially when you receive any filing that even
11 plausibly includes something classified, that you literally
12 just pick up the phone and talk to Mr. Hartenstein before
13 sending it anywhere or filing it or doing anything that would
14 be inconsistent with the handling of classified information.
15 But it seems like this is just something that you could talk
16 through.

17 The one example you've given here, it's not my
18 understanding, from my experience with these matters, that
19 first names are never classified. I think it depends on the
20 circumstances and the contexts, and there are certainly
21 circumstances in which a first name may well be classified
22 information. So I wouldn't think that that's a categorical
23 rule, and whether you agree with it in a particular instance is
24 a different story, but it just underscores that I don't know if
25 you can deal in categoricals here. But I'm not sure what

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1 you're asking or proposing with respect to paragraph 9 or
2 otherwise. But you raised it with respect to paragraph 9.

3 MS. SHROFF: That's all we said, and we don't have an
4 issue with communicating with the CISO. We've done so
5 frequently. It would help if the SCIF could go back to having
6 a working secure line, which we don't have right now, but
7 that's an aside. But we also do get guidance from the equity
8 holder, and we got guidance during the trial last year and we
9 just thought it would be helpful to get some. That's all.

10 THE COURT: All right. And I firmly agree.

11 And Mr. Hartenstine, I don't know. Is there no
12 working phone in the SCIF now?

13 MR. HARTENSTINE: Your Honor, as of last week, the
14 situation with regard to the secure line has been remedied, and
15 we are now able to connect securely and have classified
16 discussions.

17 THE COURT: OK. That issue's been fixed.

18 Let me just encourage everybody to have more
19 communications about these things. And again, we'll get to the
20 filing in particular.

21 But Mr. Hartenstine, I would certainly invite you to
22 discuss these with standby counsel, and if it's possible to
23 facilitate direct communications with the classifying authority
24 about it, great. At the end of the day, you know, I think not
25 inviting a debate about whether something should or shouldn't

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1 be classified, but I certainly think that standby counsel and
2 Mr. Schulte are entitled to as much transparency as possible so
3 that they know what they need to do and there's no ambiguity.

4 All right.

5 MR. DENTON: Your Honor, if I may, just on that point?

6 THE COURT: Sure.

7 MR. DENTON: I think we are happy to also play a role
8 providing that information. I think that to the extent that
9 there's going to be a position from the United States in this
10 matter with respect to classification or something like that,
11 Mr. Lockard and I obviously have to rely on the classifying
12 authorities, but we don't think that it would be appropriate
13 for the defense to be having sort of *ex parte* conversations
14 with the classifying authority, who is also the victim agency
15 here.

16 Again, we are happy to help facilitate this process.
17 We are happy for Mr. Hartenstine to be involved and to play a
18 role in sort of submitting things for classification review. I
19 think that once we get into sort of communications with an
20 entity of the United States, that entity's represented by
21 Mr. Lockard and I.

22 MR. HARTENSTINE: Your Honor, if I might?

23 MS. SHROFF: Well --

24 THE COURT: Hold on.

25 Yes, Mr. Hartenstine.

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1 MR. HARTENSTINE: I think I would agree with
2 Mr. Denton that they are --

3 THE COURT: Just keep your voice up.

4 MR. HARTENSTINE: Excuse me, your Honor.

5 I would agree with Mr. Denton that I am not a proper
6 representative of any intelligence community component in the
7 courtroom or in terms of taking a position in this case and
8 that the government certainly has its role to play, a role to
9 play there. And I would -- there are, you know, facilitating
10 questions about classification or the issues that I can
11 directly handle with standby counsel is one thing, but in terms
12 of seeking information through official channels from the
13 intelligence community, that may be more appropriately done
14 with the government as part of the conversation.

15 THE COURT: All right.

16 Ms. Shroff, I guess putting aside whether there's any
17 legal issue with respect to you speaking with the intelligence
18 community representatives without counsel for the government in
19 the spirit of just promoting better communication, I also don't
20 see any harm in having them participate in that so everybody's
21 on the same page with respect to what is and isn't classified.
22 That's all we're talking about here, not debating whether it
23 should be, just understanding what the lines are.

24 MS. SHROFF: Well, your Honor, I wanted to say two
25 things.

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1 I would like to take Mr. Hartenstine off the hot seat
2 and say that I cannot recall, in the five years I've worked on
3 this case, ever having any contact with the CIA directly. In
4 fact, at every juncture we have been stopped from talking with
5 the CIA directly, and we have never done that. So I think
6 there is zero possibility that we are in some way having,
7 quote/unquote, *ex parte* conversations with that agency, and I
8 wanted to put that out there.

9 I think actually Judge Crotty was not part of the
10 government's side on that point, but I won't belabor that point
11 at all.

12 Secondly, your Honor, sometimes we consult with the
13 CISO on matters that we wouldn't want to consult with the
14 government. I think that's the whole reason the CISO is
15 provided to us. We have, I believe, a very healthy
16 communication line with Mr. Hartenstine, Mr. Rucker, and we use
17 them as a resource so that, in the first instance, we are able
18 to ask them a question and if they give us an answer we might
19 want to modify our filing in a certain way so as not to give
20 the government a heads-up. I don't believe, and of course, I
21 speak for Mr. Schulte here; he can interrupt me because he's
22 the lawyer on the case. But I may not want the government to
23 know something and I may just decide that depending on what Mr.
24 Hartenstine tells me I'll make my argument a different way. I
25 don't need to front that to the government. If Mr. Hartenstine

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1 wants to get feedback from the United States or the CIA, of
2 course, he's free to do so. But I don't think I should have to
3 ask Mr. Denton about something that I don't want to ask him
4 about.

5 THE COURT: All right. I don't think anyone was
6 suggesting that you can't talk to Mr. Hartenstine without
7 Mr. Denton or Mr. Lockard participating.

8 MS. SHROFF: OK.

9 THE COURT: I think the question was if it went beyond
10 that and you spoke directly to the CIA or other members of the
11 intelligence community. But I think if that were to happen,
12 it's fair to include members of the government to, again, just
13 ensure everybody's on the same page. But in the absence of
14 that, I think more open communication with Mr. Hartenstine and,
15 for that matter, with the government could resolve a lot of
16 these issues.

17 MS. SHROFF: Your Honor, actually, most respectfully,
18 I don't think that's correct. I think what the government is
19 trying to do in a sense here is if we were, for example, to
20 contact witnesses of the CIA, I don't believe that the
21 government should be part of that discussion.

22 THE COURT: And we will get to that. That's paragraph
23 26.

24 MS. SHROFF: OK.

25 THE COURT: But we're not there yet.

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1 Turning to paragraph 20, No. 1, to the extent that
2 there are disputes about the last sentences of 20(a) and (b),
3 which pertain to the role of standby counsel in making filings
4 and determining if they have classified information, I'll talk
5 more broadly about that in a moment. Again, I think they're
6 not really properly placed in these paragraphs, which paragraph
7 20 pertains to the filing of documents that the defendant or
8 standby counsel know or reasonably should know contain
9 classified information. In that sense, you know, having
10 content that pertains to the obligations to review it doesn't
11 make sense in a paragraph that already presumes that it is
12 classified or known to be classified. So I'm inclined to pull
13 those out and make a separate paragraph that governs the
14 obligations to review things before they are filed separate
15 from how they're handled once a determination is made that they
16 contain classified information, or might.

17 As for the broader question -- that, again, sort of
18 goes to whose responsibility it is and communications, and what
19 have you -- I'm open to suggestions and thoughts here. It
20 doesn't seem like it's that onerous to discuss with standby
21 counsel that play this role with respect to filings that the
22 defendant would make, and I spoke about this back in December;
23 it seems to me that filings pertaining, for instance, to things
24 like the laptop or the hard drive, very unlikely, if not
25 clearly, not classified; things pertaining to Mr. Schulte, his

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1 experiences as an employee of the CIA and knowledge he gained
2 at the CIA, very likely classified. The latter should
3 presumably go through the review process, the former probably
4 don't. But it seems to me that maybe one solution or option
5 here is that if anything is even remotely close to the gray
6 area, that standby counsel should pick up the phone and call
7 Mr. Hartenstine and have a conversation, describing in general
8 terms what the filing is about, and then discuss whether it
9 should go through the classification review process or it's not
10 necessary. That seems like it might solve a lot of these
11 problems instead of -- I don't quite know what the
12 counterproposals are here, but it seems to suggest sort of just
13 putting that all on the government.

14 Ms. Shroff.

15 MS. SHROFF: That's what we've always done, your
16 Honor. I think we've done that even recently. We called Mr.
17 Hartenstine and said we'd flagged something, and he said go
18 ahead and file it or don't go ahead and file it, and that
19 works.

20 THE COURT: My understanding is one of the recent
21 incidents involved you did that but only after sharing it
22 internally amongst yourselves on a computer and putting it on
23 Dropbox, which obviously, if there's something that involves
24 classified information is not the way it should be handled. So
25 reach out to Mr. Hartenstine earlier in the process before you

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1 share it with him in any manner like that.

2 MS. SHROFF: I understand that about the document the
3 Court is referring to, but we did not, as standby counsel,
4 think that the information that was in that document was
5 properly classified anymore given the rulings at trial and
6 given the rulings by Judge Crotty. So that's precisely the
7 problem that I'm trying to articulate, which we've articulated
8 to the CISO. It was our not just good faith belief but our
9 checked belief that that was not classified. So if this was a
10 closed session, I could elaborate some more, but obviously, we
11 did not believe that that topic or the words were classified
12 anymore.

13 As an alternative, once that happens, we suggested, if
14 there is something that sort of hit the bell, even if we had
15 determined that it had been declassified subsequent to the
16 trial or during the trial, the best way might be, instead of us
17 handing the documents to the CISO, Mr. Schulte, who is in the
18 SCIF, informs the CISO and the CISO gets it from the SCIF
19 because we have now decided that there is something to be
20 worried about.

21 The CISO has a secure email. They can email it to the
22 government, who wishes to look at it, discuss it with the CIA,
23 and then get back to us. That way we are not part of the
24 equation. It's not that we don't want to do it. It's that we
25 have zero ability there.

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1 Of course, we can always do what we used to do before,
2 which is take a classified filing, print it out, walk it up to
3 Judge Crotty's chambers, drop it off there, meet the AUSA's
4 representative. I think Mr. Kamaraju and I met at the MCC in
5 that alleyway all the time because it was halfway between the
6 U.S. Attorney's Office and the SCIF and handed it over to each
7 other. It worked for the entire trial, and we're happy to do
8 it again. There's zero issue there. What we don't know is if
9 the filing comes from Mr. Schulte. And then there's a step
10 that the Court, I hope, gets, which is Mr. Schulte and standby
11 counsel may not always be on the same page. There's a balance
12 there too. Who trumps on that issue? Does Mr. Schulte win or
13 does standby counsel win?

14 THE COURT: On the issue of whether it contains
15 classified information?

16 MS. SHROFF: Not just whether it contains classified
17 information, whether there's even a remote possibility that it
18 contains classified information, whether it was classified and
19 is now declassified, whether it should be delayed by going to
20 the CISO, whether it should not be delayed by going to the
21 CISO.

22 You referred to some tension in terms of -- you know,
23 this is a new system, and I can't think of a single instance in
24 which a case like this has standby counsel in the mix. It
25 complicates matters, right? And the last thing we'd like to

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1 do, it would be my worst, the biggest nightmare to be a fact
2 witness against my own client. That would be a horror.

3 THE COURT: I don't envision that.

4 MS. SHROFF: Right.

5 THE COURT: Two problems. First of all, it doesn't
6 cause a delay in the litigation in the sense that when
7 something goes through the classification review it's still
8 filed with the Court, with the government. So in that sense
9 there's a delay in it being publicly docketed, but it shouldn't
10 be causing meaningful material delays in the litigation.

11 No. 2, I think my view is whoever has the more
12 conservative, cautious view of the filing should prevail. If
13 Mr. Schulte happens to think "I don't think this has been
14 declassified, I think this is actually classified and we should
15 run it through," then he should prevail. If he thinks this is
16 not classified because it was public or it was at the last
17 trial and you're not sure, I think you prevail. In other
18 words, I think whoever is more cautious and conservative on
19 that front, that view should prevail, which is to say you
20 should always err on the side of caution. And if Mr. Schulte
21 has a different view, that's tough.

22 The process requires you, as an independent actor in
23 the process, to ensure that if there is any doubt whatsoever
24 that it is confirmed through either the classifying agency or
25 the CISO, or whomever. But that, to me, doesn't seem

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1 complicated.

2 MS. SHROFF: So the Court and I are not in
3 disagreement. We agree that the document in the court system
4 should get to the government and the Court, and how it gets to
5 them the preferable method would be what we did before, when we
6 were before Judge Crotty. Because the CISO was not typically
7 here, we generally just called Mr. Gonzalez and said: I have a
8 filing. Should I bring it up? He said yes or no, and we did.
9 We're happy to do it again, and the same for the government.
10 They can meet us halfway and we'd just hand it over. And same
11 when they have a classified filing. It worked for us before,
12 and we're happy to continue in that vein.

13 When Mr. Schulte went standby is when there was a
14 suggestion that he would be in touch directly with the CISO,
15 which is more efficient if the CISO is here. So he lets Mr.
16 Hartenstine knows he has a filing. Mr. Hartenstine gets the
17 filing. He gives a copy to the Court, which the Court might
18 prefer rather than dealing with standby counsel, and then he
19 gives another copy to the government. Either way is fine.
20 Honestly, we don't have much of an issue there.

21 THE COURT: OK. So I'm not sure why this is all so
22 complicated.

23 I also should say that my understanding is that the
24 CISO does plan to be here on a semiregular basis going forward
25 and particularly around the significant filing deadlines in our

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1 pretrial schedule, so that might facilitate things.

2 Mr. Denton, do you have thoughts here?

3 MR. DENTON: I think as far as the logistics go, your
4 Honor, we're happy to do whatever makes this process as
5 efficient as possible. I think with respect to the submission
6 of the classified filings, I think really the only concern we
7 have is that before something gets filed on ECF standby counsel
8 also play this role in taking a look at it. If there is
9 concern, we have no issue with things being filed, as they were
10 frequently before, as Ms. Shroff noted, as
11 secret-pending-classification review. Again, we're happy to do
12 it however's the easiest way. The big issue is that once
13 something classified gets filed on ECF, even to the extent that
14 it gets taken down, it never really goes away. And so we're
15 just trying to avoid that outcome.

16 MS. SHROFF: Your Honor, may I suggest that the best
17 course would be for either Mr. Schulte or standby counsel to
18 notify the CISO and the CISO should take it from there?

19 THE COURT: I'm not sure I disagree. I think that
20 might make sense. I think the question is what you notify them
21 about. I think part of the problem that has arisen is filings
22 that the government or the CISO or the classifying authority
23 see on ECF for the first time and say, Oh, my God, that
24 contains classified information, and then that's the problem.
25 So we want to avoid that.

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1 MS. SHROFF: And I believe that after that one
2 incident that the government claimed contained classified
3 information, we haven't had that issue, and we'd like the
4 process to be that the CISO is informed by Mr. Schulte or I or
5 Ms. Colson and the CISO takes it from there, because the
6 classified filing should preferably go to whoever the CISO is
7 here.

8 THE COURT: Mr. Hartenstine.

9 MR. HARTENSTINE: Your Honor, I think that is the
10 proper method of filing, is that CISO is responsible for
11 overseeing the security of the classified filing process and
12 we're happy to and responsible for playing that role. In the
13 event that we're notified the day of and the CISO is not
14 physically in the Southern District -- as you know, we are in
15 Washington D.C. -- then we might ask the parties to coordinate
16 and facilitate the exchange of material and deliver it to the
17 Court. But as you note, your Honor, my office is committed to
18 maintaining a presence throughout the major deadlines in this
19 case and anticipating the needs that exist.

20 THE COURT: OK. It sounds like everybody is at least
21 nominally on the same page. I'm not quite sure why it can't
22 work smoothly, but I think what I'll do is, again, keep the
23 substance of the last sentences of 20(a) and (b) in here,
24 because I do think standby counsel has some independent
25 obligation to make sure that classified information is not

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1 publicly filed and that it goes through the classification
2 review process, but I want to make that a standalone paragraph,
3 to make clear that counsel and Mr. Schulte should err on the
4 side of caution and submit things to the CISO for consideration
5 before they are publicly filed to avoid any serious problem,
6 and I'll try to come up with some appropriate language there.

7 I think, thinking out loud, what I may do is actually
8 docket a draft revised version of this order and give all sides
9 a limited opportunity to just submit comments on any of my
10 changes, and that way, rather than drafting here, give you an
11 opportunity to be heard.

12 All right. Relatedly, just so you know, as you
13 probably have figured out and seen, I tend to use electronics
14 more than some of my colleagues. I'm largely paperless, which
15 is more complicated when it comes to classified documents, but
16 the CISO has kindly made available to me a device that I can
17 use to review things electronically that are submitted in
18 classified form to facilitate that, and to facilitate loading
19 things on it, I'm going to ask both sides, when you're making a
20 classified filing, to burn it on to a DVD or a CD to submit to
21 the Court along with the hard copy.

22 Ms. Shroff, I'll ask you to discuss with Mr.
23 Hartenstine the best way to do that. I think he has some
24 thoughts with respect to facilitating that in the SCIF that
25 would make it easy enough for you to do. But going forward, I

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1 would ask that you do that so that we have things in both paper
2 form, hard copy and electronic format available.

3 MS. SHROFF: Your Honor, would it be possible for the
4 CISO to also give us what he gave you? We've been asking for
5 that for quite some time, but Mr. Hartenstine wouldn't give it
6 to us.

7 THE COURT: I tend to have more power in such things
8 than you, I imagine.

9 Mr. Hartenstine.

10 MS. SHROFF: Judge, literally.

11 MR. HARTENSTINE: Your Honor, the device that was
12 provided to the Court functions the same as the hardware that
13 we've given to the defense and standby counsel in that it, you
14 know, doesn't connect to the internet; it doesn't network, and
15 it just allows for the digital review of classified material in
16 a secure fashion. It's just a different kind of device.

17 THE COURT: Gotcha. So they have a device that
18 performs the same function. Is that what you're saying?

19 MR. HARTENSTINE: They have multiple.

20 THE COURT: OK.

21 Ms. Shroff, feel free to discuss it with Mr.
22 Hartenstine. Feel free to discuss it.

23 Mr. Denton, you raised an issue in paragraph G of your
24 letter at Dkt. 676, 7(g), excuse me, that I'm not sure I
25 understood.

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1 MR. DENTON: So, I think, your Honor, that this is the
2 result of sort of dueling edits from both the government and
3 standby counsel which essentially asks for the government to
4 review a document before it gets provided to the CISO. I think
5 we've largely resolved that. We are happy to facilitate
6 whatever review process needs to happen once documents are
7 submitted to the CISO.

8 THE COURT: All right. Again, I'll try my hand at a
9 paragraph that governs all of that.

10 All right. Paragraph 23, which is the government's
11 proposed language on the classification review, I'm fine with
12 that, but I wonder if, Mr. Denton, as we get closer to trial,
13 it would make sense to revisit this and, perhaps, make the
14 timeline shorter on the theory that it is more significant at
15 that point.

16 MR. DENTON: Yes, your Honor.

17 I think also, as was the experience the last time,
18 once we get through the Section 6 process, most of what we
19 should be talking about should be, at least in some form,
20 whether redacted or otherwise, available unclassified, so
21 hopefully also the volume of classified filings goes down. But
22 we're happy to see where we are; we recognize that a lot of
23 these issues may need to get ramped up one way or another in
24 advance of trial.

25 THE COURT: All right. I may add a provision that

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1 just says we'll revisit it in a month or two before trial, but
2 you can also alert the classifying authority that as we get
3 closer, the expectation will be that those time frames will go
4 down.

5 Next is paragraph 25(j). It's also paragraph 6. This
6 pertains to the issue Mr. Schulte raised himself -- namely,
7 materials provided to standby counsel but not to him. I am
8 going to leave those provisions in. I'm not aware of any such
9 materials at the moment, but it certainly is possible that
10 there may be some in the future, and in any event, I think the
11 protective order should govern that possibility. Obviously if
12 there is any such material and standby counsel think that
13 there's no reason that it shouldn't be provided to Mr. Schulte,
14 then that issue can be litigated. But the Court did rule on
15 that in the *Moussaoui* case and found at least with certain
16 materials that that was an acceptable way of addressing the
17 defendant's Sixth Amendment rights.

18 I will say I will obviously look with or scrutinize
19 any production of that sort here given that Mr. Schulte is
20 representing himself, and in that regard, unless there's a very
21 good reason, he should have access to whatever discovery is
22 produced to the defense. But since there certainly could be a
23 scenario in which there's a reason to withhold something from
24 him, I'll leave those provisions in here, which is not to say
25 that there will be a scenario of that sort.

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1 All right. Paragraph 26 is the issue that we briefly
2 touched on earlier regarding contact with members of the
3 intelligence community. I guess I don't quite understand the
4 issue here. It doesn't seem unreasonable to have the CISO be
5 the conduit and point person to set up any communications with
6 such persons.

7 Ms. Shroff, why is that a problem or an issue?

8 MS. SHROFF: Your Honor, Mr. Schulte wants to take
9 this one.

10 THE COURT: Sure. Go ahead.

11 THE DEFENDANT: Yeah. So, the issue, I think, is in
12 the past, even when I left the agency, I still contacted former
13 colleagues directly and that now that I'm *pro se*, I intend to
14 do that again. There's no classification --

15 (Counsel conferred with defendant)

16 THE DEFENDANT: Obviously, the conversations were not
17 classified when I was speaking with them, but anyway -- yeah,
18 so there's no, there's no regulation or law against someone who
19 was formerly colleagues or friends with someone who's -- even
20 if someone's undercover working for the agency, contacting them
21 and having an unclassified discussion with them. And I
22 obviously did that long after I left the agency, and I don't
23 see any reason why I should not be able to do that for the
24 trial, to contact witnesses in this manner.

25 THE COURT: And I'm not saying that you can't contact

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1 them, but what's the problem with funneling those through the
2 CISO and having him set up any communications? Because there
3 certainly could be classified --

4 THE DEFENDANT: Yeah. So --

5 THE COURT: -- information concerns inherent in who
6 these people are or what their roles were or are.

7 (Counsel conferred with defendant)

8 THE DEFENDANT: Yeah. So I think the issue is we're
9 concerned, obviously the CISO is not -- my lawyer can't
10 advocate for me, and we're concerned with how the requests are
11 being facilitated or communicated to the individuals, and I
12 would prefer to take that on myself instead of -- I mean, they
13 had issues before where witnesses came, and then the agency
14 found out about it and they started -- they talked to them and
15 got them to not talk to my attorney after that. So the last
16 time, however, we were notifying who we were contacting, the
17 CIA was actually jumping in and making sure we were not able to
18 contact witnesses. And so that was a major issue last time
19 that I seek to avoid this time.

20 THE COURT: OK. I'm sure that Mr. Hartenstine would
21 simply transmit in good faith that you wished to speak to
22 someone. What happens from there is a different story.

23 Mr. Denton.

24 MR. DENTON: Your Honor, first of all, just to be
25 clear, I'm not aware of any instance in which the government or

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1 any of the agencies involved in this case dissuaded witnesses
2 from speaking with the defendant or defense counsel. We think
3 that, again, the right process here is simply for the
4 transmission of the request to Mr. Hartenstine. It will go to
5 a person who's walled off from anyone involved in the
6 prosecution to transmit the request. We think that's an
7 entirely reasonable way. It worked well before.

8 MS. SHROFF: Your Honor, may I?

9 THE COURT: You may.

10 MS. SHROFF: Actually, there was an incident when the
11 government intervened, and by government, I just mean widely
12 either -- who in the DOJ, we do not know. It is a matter of
13 public record. It was said so and put on the record before
14 Judge Crotty. An individual was subpoenaed. He showed up. He
15 sat outside the courtroom. He came in because Judge Crotty
16 called the case. We told the person to sit there. We went
17 out, and the person had disappeared. He had, in fact, been
18 moved by the CIA. The CIA did intervene, and we put this on
19 the record and it's part of the trial transcript. And I
20 believe Mr. Denton was part of that trial team, so maybe he's
21 forgotten; it's been a while. But it definitively was on
22 record. The individual was subpoenaed. He showed up, and then
23 he was whisked off the floor on which the trial was held.

24 Mr. Schulte has an absolute right to approach his
25 witnesses the way he would advocate for himself, to ask the

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1 witness in a manner that perhaps Mr. Hartenstine would not be
2 able to duplicate. Perhaps they would be moved by
3 Mr. Schulte's voice. Perhaps they would respond more kindly if
4 it was Mr. Schulte's standby counsel asking for them to meet or
5 speak. We're cognizant that we're not to discuss any
6 classified information with that witness, and if we're deemed
7 capable of executing that responsibility with documents, I
8 don't see why we're not found equally capable of discharging
9 that responsibility when we contact a witness.

10 I note here that there are certain witnesses that we
11 contacted during the first trial who indicated to us that they
12 would be happy to hear from us again. I don't believe I need
13 to share that information with the United States or with the
14 CISO for that matter. I think Mr. Schulte's entitled to reach
15 out to his friendly witnesses and see if he can get them on his
16 side or for them to testify without involving anybody who has
17 any connection with the CIA. A witness is a witness. Of
18 course, Mr. Schulte and standby counsel would not be able to
19 talk about anything classified.

20 THE COURT: Well, you say that, but Mr. Schulte is
21 obviously accused of leaking classified information not only in
22 the initial leaks but also from the jail and violating the
23 Court's protective orders, so there's a reason he's under same.
24 In that regard, unfettered communication is something that
25 Mr. Schulte doesn't have. It just doesn't seem that onerous to

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1 require Mr. Hartenstine, the CISO, to basically be the
2 intermediary. If Mr. Schulte wants to use his own words, he
3 can put it in writing and have Mr. Hartenstine deliver it in
4 writing. I just don't see how that interferes with his ability
5 to present and put on a meaningful defense.

6 MS. SHROFF: Ms. Colson and I are not on the SAMs, and
7 Ms. Colson and I are aware of our responsibilities, so at least
8 Ms. Colson and I should be able to contact the witnesses
9 directly without involving the United States or the CISO.

10 THE COURT: All right. I'll take it under advisement,
11 but my inclination is it's not an unreasonable precaution to
12 have the CISO be the intermediary, at least as to members of
13 the intelligence community, given the potential sensitivities.
14 But I'll take it under advisement.

15 With respect to paragraphs 29 through, I think, 32,
16 these govern the SCIF.

17 Mr. Denton, a couple things. First of all, from
18 standby counsel's letter, I gather that earlier in this case
19 Mr. Schulte was in the SCIF alone and wasn't accompanied. I'm
20 curious to know what has changed that requires him to be
21 accompanied now. It certainly doesn't seem like it's a
22 productive use of taxpayer money to have Ms. Shroff or
23 Ms. Colson just, you know, babysitting him in the SCIF. I'm
24 not sure it's necessary, and if there are particular reasons,
25 perhaps they could be addressed in some other fashion.

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1 Any thoughts on that?

2 MR. DENTON: So I think, your Honor, first of all, if
3 I can just confirm, Mr. Hartenstine may be able to speak to
4 this, my understanding is that there were rules about the
5 courthouse SCIF that the defendant was not allowed to be
6 unaccompanied there.

7 Is that right?

8 MR. HARTENSTINE: Your Honor, that is correct.

9 THE COURT: OK. But what is it about the courthouse
10 SCIF that differs from the 26 Federal Plaza SCIF?

11 MR. DENTON: Your Honor, I think, first of all, it's
12 just different classifying authorities, different rules. This
13 was something that came up when we were talking about the
14 courthouse SCIF. I think we were taking our guidance about
15 what the requirements were and, frankly, didn't ask any more
16 than what was required for his maximum access to the SCIF here.

17 THE COURT: OK. Mr. Hartenstine and I talked about
18 this a little before the conference. I guess I'm not sure
19 what's going on now, which is to say I'm not sure why
20 Mr. Schulte does need to be accompanied at all times. My
21 impression also is that counsel's often just sitting outside
22 and in that sense not actually inside with him anyway. I would
23 think, my understanding, and anyone can correct me if I'm
24 wrong, is there are several issues. One is that the
25 combinations to the SCIF and the safe are themselves classified

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1 information and that's information that can't be provided to
2 Mr. Schulte. So that's one thing, but I would think that as
3 long as those things are opened for him, then it follows that
4 somebody needs to stick around for the duration.

5 No. 2 is the phone, but I wonder whether that could be
6 changed or removed when he's not accompanied by someone.

7 No. 3 is his ability to take things out of the SCIF,
8 but I would assume that the marshals search him every time he
9 returns from the SCIF and I would think that that would provide
10 an adequate precaution for that concern. I guess I'm trying to
11 understand whether it's actually necessary to have somebody
12 with him at all times.

13 MR. DENTON: I think, your Honor, to the extent that
14 there is not a rule that requires there to be a physical second
15 human being just for purposes of having another body in the
16 room, all of the things that he requires assistance with -- and
17 there are a number of things that do require another person to
18 assist the defendant -- are things that, you know, could be
19 done at particular times, start and fixed points so we can
20 probably work out some sort of schedule or other arrangement
21 for that.

22 THE COURT: OK.

23 Ms. Shroff.

24 MS. SHROFF: Your Honor, I'm assuming you don't want
25 me to speak to the SCIF at the FBI, right?

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1 THE COURT: I'm concerned about the one here.

2 MS. SHROFF: The Court is direct. We would not give
3 Mr. Schulte the pass codes to the door of the SCIF or the alarm
4 that is set to come in and out of the SCIF. We would open the
5 cabinets and close the cabinets. Of course, we are there at
6 eight. One member of the team is there at eight to --
7 actually, we have a pretty decent system going. The marshal
8 emails us or we email them, and they say Mr. Schulte's at X
9 point and come on up. We let Mr. Schulte in, and we check in
10 with Mr. Schulte for all the things that he needs, and then we
11 come back to close up the SCIF. And there's no reason for us
12 to be sitting in the SCIF with him because there is -- hours go
13 by where we're just sort of sitting there, when we used to
14 actually sit within the SCIF. But we will actually step out so
15 that we can actually do some work. We don't bug you for that,
16 the Schulte team.

17 There's really no reason for it because we accomplish
18 literally nothing. We have no ability to search Mr. Schulte.
19 We have no ability to frisk him, and we certainly don't examine
20 what he brings in or takes out. So if the Court would, most
21 respectfully, allow us to follow the procedure that we've
22 outlined, I think taxpayer money would be saved. We would be
23 more efficient, and we'd continue to provide Mr. Schulte the
24 opportunity to confer with us.

25 With the phone, I think the easiest solution is to,

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1 perhaps, give it a new number and not tell Mr. Schulte what the
2 new number is -- I don't think Mr. Schulte knows the number
3 anyway -- and make the phone such that no outgoing calls are
4 allowed, only incoming calls are allowed, so the problem's
5 solved. There's no issue then with regards to the phone.

6 I do know that the United States Marshals that sit
7 outside and watch Mr. Schulte are extremely, extremely
8 professional, extremely kind and extremely responsible, and are
9 actually watching him through the monitor, as is the FBI agent.
10 Each one of them has our cell phone number, and they call or
11 text us if there's any issue at all. And we've had not a
12 single hiccup with anyone from the United States Marshals
13 Service, any of them. It's smooth. Even delays are
14 communicated. They're kind enough to tell us that MDC's
15 running late so if one of us is running late, then we sort of
16 stop and take a breath.

17 We have no issues there at all.

18 THE DEFENDANT: One thing I wanted to add, if I could,
19 is for the phone, it could be another simple thing where, for
20 example, phone numbers can be programmed in it that I can use,
21 for example, to attorneys, to Dan, or to the Court's office, or
22 whatever, and say whenever I come in they can swap the phones
23 out or just whatever this phone is that just has a restrictive
24 list of who I can call. Or they can just monitor the call,
25 obviously, outgoing and incoming calls, and obviously there's

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1 not going to be any issues, but they can review it that way. I
2 mean there's many ways to use the phone. I rely on that phone,
3 obviously, to contact the government, let Dan know of things,
4 contact the attorneys. And so it would be useful to keep that
5 in there, and there's many ways that it can be restricted if
6 the government sees it that way, so --

7 THE COURT: All right. Assuming that we can solve the
8 phone problem, Mr. Denton, anything you wish to say on this?
9 It seems like that might make more sense than having a
10 categorical "he must be accompanied at all times" rule.

11 MR. DENTON: I think that's fine, your Honor. I think
12 the only other thing I would note is that the Court's previous
13 order about transmission of mail between the parties was sort
14 of keyed to there being someone there on the defendant's SCIF
15 days. That obviously does not require someone there all day as
16 long as someone is there at some point to play that role.

17 THE COURT: I think Ms. Shroff made clear they are
18 there at some point, so it's just a question of whether they
19 need to sit there for the entirety.

20 Mr. Hartenstine, you mentioned earlier to me that you
21 were going to look into whether there were means of restricting
22 the phone that would potentially address the phone concern.
23 Can you do that and see if some of these ideas are, perhaps,
24 viable ones?

25 MR. HARTENSTINE: Yes, your Honor. I'll do that

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1 promptly.

2 THE COURT: OK. Great. In principle, I agree it
3 doesn't make a whole lot of sense to make Ms. Shroff or
4 Ms. Colson sit there all day.

5 Paragraph 30 calls for, standby counsel objects to the
6 requirement that they be screened for electronic devices.

7 Is there some reason that that is appropriate here,
8 Mr. Denton? Because as officers of the Court, I can't imagine
9 that they would violate the rules or regulations there, I'm not
10 aware of any incident of that sort. It seems unnecessary.

11 MR. DENTON: Candidly, your Honor, this we cut and
12 pasted from the December 2018 supplemental order that was
13 entered on consent verbatim. With respect to the substantive
14 question, I don't think we care as long as it specifies that,
15 you know, no electronic devices of any kind are permitted to be
16 brought into the SCIF. The screening language was just a
17 holdover from the old version.

18 THE COURT: OK. I'll take out the screening language,
19 and I think that is a rule regarding the use of the SCIF in
20 general. So in that sense it exists independent of any order
21 that I may enter.

22 Paragraph 32 is the bolt paragraph. I will discuss
23 that with the marshals. My inclination is probably to take it
24 out all together on the theory that I'll leave those
25 determinations to the marshals, but let me talk to them about

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1 what the issues are and look into it.

2 I'm not sure what the waiver of liability issue is.
3 Standby counsel doesn't seem to think it's necessary.

4 Mr. Denton, do you want to tell me where that comes
5 from and what the issue is there.

6 MR. DENTON: Again, your Honor, that's from the
7 December 2018 order. Again, to the extent that it's not
8 necessary now, again, we're happy to defer to Mr. Hartenstine
9 and to the marshals on what's appropriate for the security
10 arrangements here.

11 THE COURT: All right.

12 Mr. Hartenstine, do you have any reason to think that
13 the liability waiver is necessary or appropriate?

14 MR. HARTENSTINE: I don't, your Honor.

15 THE COURT: All right. Then I'll probably take that
16 out, but I'll confer with the marshals as well.

17 Paragraph 33 pertains to the use of the SCIF phone.
18 I'll note there's a line in here about the defendant only using
19 the phone to speak with standby counsel or counsel for the
20 government, but that's obviously not exhaustive in the sense
21 that I take it he uses it to speak with the CISO, and should
22 there be any communications with members of the intelligence
23 community about classified matters, it would also require that
24 phone. So I don't think that this is an exhaustive list, and
25 I'll try and figure out some way to modify it accordingly.

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1 That's all that I wanted to cover on the proposed
2 order. Again, I think what I'll do is enter a draft order and
3 give both sides an opportunity in a week or so to respond with
4 any additional comments regarding my proposed changes.

5 To the extent that Mr. Denton you have thoughts on
6 deleting 2(b), 4 and 5 and concerns about anything in there
7 being lost and not reflected elsewhere, you can make your
8 comments at that time. So why don't you just wait for me to
9 enter a draft order in the first instance. Obviously, until I
10 issue a new order, the existing orders remain in effect. So
11 that we're not operating in a vacuum, those orders are still
12 the operative ones.

13 All right. We're almost done.

14 Just talking about the schedule going forward, CIPA 4
15 and CIPA 10, Section 10 notices were due on the 28th, I take
16 it.

17 Mr. Denton, anything to say on that front?

18 MR. DENTON: As the defendant noted, we provided him
19 with a supplemental Section 10 notice on that date.

20 THE COURT: All right. And CIPA 4, same thing?

21 MR. DENTON: We do not -- we did not make and do not
22 anticipate making a supplemental Section 4 motion at this time.

23 THE COURT: All right. The defendant's CIPA Section 5
24 notices are due by the 18th, by later this week. I think a
25 couple have already been filed, but whatever are going to be

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1 filed are due later this week.

2 The government's CIPA Section 6 notices are due by
3 March 18 and response by April 8. Other dates are set forth in
4 the scheduling order, Dkt. No. 628. And of course trial, is
5 June 13.

6 It does seem to me that it might make sense to enter
7 another, more detailed scheduling order with other pretrial
8 deadlines, including but perhaps not limited to, disclosure of
9 exhibit lists, 3500 material, 16(b) disclosures, and 26.2
10 disclosures by the defendant, and so forth.

11 Any thoughts? My inclination would be to have the
12 government come up with a proposal and share it with
13 Mr. Schulte and standby counsel. That can be submitted
14 hopefully as an agreed-upon schedule, but otherwise you can
15 submit your disagreements, and I'll resolve them.

16 Mr. Denton.

17 MR. DENTON: Happy to do that, your Honor.

18 THE COURT: OK. So why don't you share think that
19 with Mr. Schulte and standby counsel within a week and then
20 submit something hopefully jointly within, let's say, three
21 weeks from now to give Mr. Schulte an opportunity to give you
22 his views, and then I'll enter something that I think is
23 appropriate.

24 In terms of the next conference --

25 THE DEFENDANT: I have one.

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1 THE COURT: Yes.

2 THE DEFENDANT: I have one final issue I was going to
3 bring up if I might.

4 THE COURT: Go ahead.

5 THE DEFENDANT: It's regarding the law library issue
6 at MDC, that I spent the last few weeks trying to resolve this.
7 The MDC have been unable to do so, but previously when MDC is
8 on lockdown, they still would take us out to the law library
9 each day, but there's been a national lockdown by the BOP, and
10 the general population, they are still able to come out and do
11 their law library but not for us. This is the third week that
12 they have refused to take me to the law library.

13 And I also wanted to bring up that the government
14 previously said that I can use the law library on the weekend
15 or on SCIF days. I've still been unable to do that as well,
16 and so, like I said, I filed administrative remedies. I tried
17 to speak with MDC about this issue, but their stance is since
18 this is a national lockdown, I'm not allowed to view the law
19 library. It's causing issues.

20 THE COURT: Mr. Denton, do you want to look into that
21 and report in your letter of next week?

22 MR. DENTON: Yes, your Honor.

23 I can say we did hear from MDC today that the national
24 lockdown was affecting the defendant's law library access, but
25 other than that fact we have no other information about it. We

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1 will get to the bottom of it and report back.

2 THE COURT: All right. And if you could report back
3 on the likelihood of the lockdown continuing and what other
4 provisions can be made for access, that would be helpful since,
5 you know, obviously it becomes more and more difficult for him
6 to prepare what he needs to prepare if he doesn't have access
7 to the law library.

8 All right. I'd be inclined to schedule another
9 conference just to make sure that things are on track. It
10 seems to me, my thought -- I'm open to suggestions -- would be
11 to do it in April, maybe after the April 8 deadline to respond
12 to the government's CIPA 6 motions on the theory that we'll
13 have some better sense of the landscape. But if anyone thinks
14 an earlier conference is appropriate, I'm certainly open to
15 that.

16 Any thoughts, Mr. Denton?

17 MR. DENTON: Sorry, your Honor. I'm just checking on
18 some of the earlier, the other scheduling dates that we have on
19 the calendar.

20 I think that probably makes sense, your Honor. I
21 would suggest that that may be a good opportunity for us to
22 talk about what would be required as far as any hearings at the
23 Section 6(c) stage and to think about the logistics and
24 scheduling of that.

25 THE COURT: That's part of why I thought the timing

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1 made sense.

2 Mr. Schulte, do you have a view on that?

3 THE DEFENDANT: What day is that, April 8?

4 THE COURT: April 8 is a Friday, but I think we would
5 have a conference, and I would propose the following week
6 sometime.

7 THE DEFENDANT: I just note for the Court Mondays I'm
8 always, I have phone calls scheduled and stuff like that, so --

9 (Counsel conferred with defendant)

10 THE DEFENDANT: Family calls, yeah.

11 THE COURT: OK.

12 Mr. Hartenstine, do you have a thought on timing here?

13 MR. HARTENSTINE: Your Honor, I'm available, and I
14 think it makes sense, perhaps, to get together and discuss what
15 Section 6 may look like.

16 THE COURT: All right. So how about Wednesday, April
17 13, at 3:30, as a date?

18 Any problems with that from you, Mr. Denton?

19 MR. DENTON: Just a moment, your Honor.

20 That's fine with the government, your Honor.

21 THE COURT: Hang on one second.

22 Right. Mr. Schulte, I assume the 13th at 3:30 is fine
23 with you.

24 (Defendant conferred with counsel)

25 MS. SHROFF: Yes, that's fine.

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1 THE COURT: Ms. Shroff, I meant you as well, and
2 Ms. Colson.

3 MS. SHROFF: It's fine with me.

4 THE COURT: Ms. Colson.

5 MS. COLSON: Fine, your Honor.

6 THE COURT: Mr. Hartenstine.

7 MR. HARTENSTINE: Yes, your Honor.

8 THE COURT: All right. Let's put it down for
9 Wednesday, April 13, at 3:30.

10 I will ask that both sides submit preconference
11 letters, let's say, by that Monday, the 11th, just flagging
12 anything that you think we ought to discuss and any proposals
13 that you have with respect to the schedule thereafter, just to
14 facilitate that conference.

15 Anything else other than speedy trial application from
16 the government, Mr. Denton?

17 MR. DENTON: Just that, your Honor.

18 THE COURT: Do you want to make the application?

19 MR. DENTON: Yes, your Honor.

20 In view of the complexity of this case and the need
21 for the defendant to consider any potential additional motions,
22 including the ones he's been authorized to file, and in the
23 interest of justice, we would move to exclude time under the
24 Speedy Trial Act.

25 THE COURT: Any objection, Mr. Schulte?

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1 THE DEFENDANT: No objection.

2 THE COURT: All right. I will exclude time under the
3 Speedy Trial Act. I think technically it's automatically
4 excluded by virtue of the motions that are filed and currently
5 being briefed, but in any event, I find that it is in the
6 interest of justice to exclude time between now and April 13,
7 the next conference, to allow Mr. Schulte to prepare the
8 additional filings that are coming down the pike, to allow him
9 to review the discovery, both classified and unclassified, and
10 prepare for trial, given the complexities of the case.

11 Anything else from you, Mr. Schulte?

12 THE DEFENDANT: No.

13 THE COURT: All right. I will enter an order
14 memorializing what we've done here and likely attach to that
15 order the draft protective order for you guys to give me any
16 further thoughts on.

17 With that, thank you for your patience, and we are
18 adjourned. Have a good day.

19 (Adjourned)

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